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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 435

GENERAL ELECTRIC CREDIT CORPORATION,
Petitioner,

VERSUS

ERNEST V. NOBLETT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES D. FELLERS
2700 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

of Counsel:
FELLERS, SNIDER, BAGGETT, BLANKENSHIP & BOSTON
2700 First National Building
Oklahoma City, Oklahoma 73102

August, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

SUBJECT INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1)	2
Questions Presented	2
Statutes Involved	3
The Factual Background	3
The Proceedings in the Court Below	4
Reasons for Granting the Writ	6
The Application of Article 2-210(4) Is Erroneous	8
There Was a Waiver of Defenses Under Section 9-206(1)	12
The Appellate Determination of Intent Is Erroneous	18
The Prediction as to Massachusetts Law Is Erroneous	20
Conclusion	22

AUTHORITIES

CASES:

Advance Printing & Litho Co. v. Bentz, 387 F.2d 952 (1967)	8, 9
Advance Printing & Litho Co., In the Matter of, 277 F.Supp. 101 (W.D. Pa. 1967)	9
Baldino v. ABC Appliance Service, 83 Pa. D. & C. 305 (Philadelphia County, 1952)	15

INDEX CONTINUED

PAGE

Chatham Pharmaceuticals, Inc. v. Angier Chemical Co., Inc., et al., 347 Mass. 208, 196 N.E.2d 852 11

General Electric Credit Corporation v. Brick Plaza Lanes, Inc., et al., Superior Court of New Jersey, Law Division, Ocean County, Docket No. L25891-64, A-13908 (1966) 15

General Electric Credit Corporation v. Ludwig Beyerlein, Supreme Court of State of New York, Appellate Division —Fourth Department, — A.D. 2d — (June 24, 1968) 20, 21

General Electric Credit Corporation v. Noblett, 268 F.Supp. 984 (W.D. Okla. 1967) 15

Quality Finance Company v. Hurley, 337 Mass. 150, 148 N.E.2d 385 (1958) 20, 21

ARTICLES:

Bunn, Snead and Speidel, An Introduction to the Uniform Commercial Code (1964), p. 30 8-9

Grant Gilmore, Security Interests in Personal Property (1965) Vol. 2 Sec. 41.5, p. 1092, et seq. 12

Homer Kripke, Practice Commentary to McKinney's Consolidated Laws of New York Annotated, Sec. 9-206 16-17

STATUTES:

Uniform Commercial Code, Sec. 1-102(1) 17
Uniform Commercial Code, Sec. 2-106(1) 8
Uniform Commercial Code, Sec. 2-210(4) 7, 8, 10, 11
Uniform Commercial Code, Sec. 3-104 17
Uniform Commercial Code, Sec. 9-102 10
Uniform Commercial Code, Sec. 9-105(b) 10
Uniform Commercial Code, Sec. 9-206(1) 7, 12, 13, 14, 16, 17, 21

INDEX CONTINUED

APPENDIX

PAGE

Appendix A:
Opinion and Judgment of District Court ..... i-vii

Appendix B:
Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit ..... viii-xvi

Appendix C:
Per Curiam Opinion of the United States Court of Appeals for the Tenth Circuit Denying Rehearing ..... xvii-xix

Appendix D:
Statutes ..... xix-xxi

Appendix E:
General Electric Credit Corporation v. Brick Plaza Lanes, Inc., et al. ..... xxii-xxvi

Appendix F:
Baldino v. ABC Appliance Service ..... xxvii-xxx

Appendix G:
General Electric Credit Corporation v. Ludwig Beyerlein xxxi

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

General Electric Credit Corporation prays that a Writ of Certiorari issue to review the opinions and judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 2 and June 20, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported in 268 F.Supp. 984 (W.D. Okla. 1967) and is printed in Appendix A hereto. The original opinion of the Court of Appeals entered on April 2, 1968, and the Supplemental opinion entered on June 20, 1968, are printed in Appendix B and Appendix C hereto.

JURISDICTION

The original opinion and judgment of the Court of Appeals was entered on April 2, 1968. Rehearing was denied on June 20, 1968. A thirty (30) day order staying the mandate was granted on July 1, 1968, and the time was subsequently enlarged until August 29, 1968, in which to file this petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Does the opinion of the Court of Appeals for the Tenth Circuit conflict with recent decisions rendered by the United States Court of Appeals for the Third Circuit and the Supreme Court of the State of New York, Appellate Division—Fourth Department, thereby necessitating a review by the Supreme Court in order to clarify and preserve the uniform application of the Commercial Code, which is now in effect in 49 states and the District of Columbia?

2. Whether the Court of Appeals for the Tenth Circuit has unduly restricted the scope of Article 9 of the Uniform Commercial Code by construing it in a narrow manner, thereby conflicting with the expressed purpose of the draftsmen of the Code, that it be liberally construed?

3. Does the Rental Agreement, *taken in its entirety*, validly waive defenses as against the assignee pursuant to Article 9-206(1)?

A.) Whether the opinions of the Court of Appeals for the Tenth Circuit ignore entirely the provision in

the lease containing the *unconditional* promise of the Lessee to pay rent to the Lessor or its Order, thereby rendering this contractual provision, which was designed to impart attributes of negotiability to the lease, meaningless?

B.) Whether the opinions of the Court of Appeals for the Tenth Circuit ignore entirely the *second sentence* of the waiver clause whereby ". . . The obligations of the Lessee shall, however, continue in full force and effect," thus rendering that language superfluous contrary to fundamental rules of contract construction?

4. Did the Court of Appeals for the Tenth Circuit err in its application of Massachusetts Law?

STATUTES INVOLVED

The principal statutory provision involved is Section 9-206(1) of the Uniform Commercial Code of Massachusetts. The Appellate Court has inappropriately injected Section 2-210(4). Sections 3-104, 1-102(1), 2-106(1), 9-102 and 9-105(b) are also secondarily applicable for the purposes of clarification. These are reprinted in full in Appendix D.

THE FACTUAL BACKGROUND

For clarification and the convenience of the Court, petitioner is sometimes referred to as assignee and respondent as lessee.

Pursuant to a Rental Lease Agreement dated May 20, 1965, respondent, Ernest V. Noblett, leased eight (8) Bowl-

Mor Automatic Ten Pin Setting Machines from Bowl-Mor Company, Inc., a Delaware corporation (R. 4). According to the terms of the agreement, respondent agreed to commence installment payments for the use of the machines on September 6, 1965.

The Rental Lease Agreement provides, among other things:

> "The Lessor may assign all its rights, title and interest under this lease, including the payments due hereunder, but the Assignee shall not be held responsible for any of the Lessor's obligations. The obligations of the Lessee shall, however, continue in full force and effect."

On May 24, 1965, Bowl-Mor assigned the Rental Lease Agreement to petitioner (R. 7). After making two payments under said agreement, respondent defaulted and on October 5, 1966, petitioner commenced this action.

THE PROCEEDINGS IN THE COURTS BELOW

Petitioner instituted this suit in the United States District Court for the Western District of Oklahoma by complaint seeking the accelerated balance due under the lease, together with interest, attorneys' fees, and costs (R. 1). Jurisdiction of the District Court was based upon diversity of citizenship between the parties; petitioner being a corporation incorporated under the laws of New York and respondent being a citizen of Oklahoma.

On November 15, 1966, respondent answered petitioner's complaint by raising the defense that the machines were not as warranted and represented to him by Bowl-

Mor and that Bowl-Mor had failed to provide "on the job training" or an advertising and sign allowances, thereby amounting to a total failure of consideration (R. 8).

Petitioner filed a motion for summary judgment (R. 11), and attached the affidavit of R. N. Lamy (R. 2), who stated that petitioner took the assignment from Bowl-Mor in good faith and without notice of any claim or defenses which respondent might have against Bowl-Mor.

On July 31, 1967, the Honorable Luther B. Eubanks entered judgment granting petitioner's motion for summary judgment (R. 31-32) and held that the waiver clause in the lease precludes respondent from asserting defenses against the assignee-petitioner which respondent might have been able to allege against the original lessor.

Respondent perfected its appeal to the United States Court of Appeals for the Tenth Circuit. On April 2, 1968, the Court of Appeals reversed and remanded for further proceedings, holding that, as a matter of law, there was no waiver of defenses under Article 9-206(1), but that such a waiver clause was designed to preclude duties of affirmative performance under the Sales Article 2-210(4) of the Uniform Commercial Code.

Petitioner filed a Petition for Rehearing and Application for Oral Argument En Banc, on May 20, 1968, challenging the erroneous presumption by the Court that the language in the lease was intended to relieve obligations imposed under the Article on Sales (2-210) and not to create a waiver of defenses as contemplated under Article 9-206(1) of the Massachusetts Uniform Commercial Code.

The Appellate Court denied the Petition for Rehearing on June 20, 1968, whereupon petitioner was granted an Order to Stay the Mandate to July 30, 1968, and an enlargement of time for 30 days additional in order that this Petition for Writ of Certiorari might be filed on or before August 29, 1968.

REASONS FOR GRANTING THE WRIT

The widespread adoption of the Uniform Commercial Code, containing new language and modern concepts, presents a continuing problem of consistency in judicial decisions. The primary purpose of the Code was to make uniform the statutory law of the several states and the District of Columbia in regulating commercial transactions. It was promulgated by joint action of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and represents one of the greatest achievements of our times as it is now in effect in some 50 jurisdictions.

Uniformity, however, is being destroyed by varying judicial interpretations of the same provision of the Code and by the misapplication of the wrong Article to a particular transaction. In the case of the Negotiable Instruments Law, which was promulgated as a uniform act in 1886, by 1940 there were 30 sections which had divergent meanings in different states because their highest courts had interpreted the sections inharmoniously. It is most important that the experience under the N.I.L. not be repeated under the U.C.C.

Prompted by this exigency, it is incumbent on petitioner to bring to the attention of the Supreme Court of the United States two recent opinions by the United States Court of Appeals for the Tenth Circuit which have seriously imperiled this fundamental purpose and implore clarification. Failure to resolve this anomaly will speed the dilution of the basic philosophies underlying the Commercial Code.

The aforementioned opinions of the Court of Appeals for the Tenth Circuit have narrowly construed a vital section in Article 9 of the Uniform Commercial Code of Massachusetts, thus depriving it of much of its significance and conflicting with the purpose of the draftsmen, that the Code be liberally construed, and that form should not control over substance.

Furthermore, the opinion of the Court of Appeals for the Tenth Circuit denying petitioner's Petition for Rehearing when contrasted with the earlier opinion in this case, leaves wrapped in the mists of uncertainty the applicability of Section 2-210(4) of the Code to an Article 9 transaction involving the assignment of chattel paper (a lease) to a financial institution.

The initial opinion of the Court of Appeals for the Tenth Circuit held ". . . that the intent manifested by the quoted provision of the Lease Agreement was not to waive defenses as allowed by 9-206(1) of the Uniform Commercial Code but to relieve the assignee of the duty of affirmative performance of the lessor's obligations under the lease with reference to an entirely different section of the Code" 2-210(4)! Such a holding is demonstrably erroneous and conflicts with the decision of the United States

Court of Appeals for the Third Circuit in *Advance Printing & Litho Co.* v. *Bentz*, 387 F.2d 952 (1967).

After rendering this initial opinion, the Court denied petitioner's Petition for Rehearing and stated that it ". . . did not refer to Section 2-210(4) to indicate that the 'Sales' provisions of the Code *necessarily* governed secured transactions in the absence of language so providing but rather to demonstrate that waiver of affirmative performance is not the same as waiver of defenses for nonperformance by a party to the original contract." (Emphasis added.) If such language purports to clarify, the noncommital effect of "necessarily" renders the opinion even more uncertain and creates a real and serious danger to assignment financing.

The Application of Article 2-210(4) Is Erroneous

If the Court of Appeals for the Tenth Circuit means to say, even inferentially, that the clause in the Rental Lease was intended to relieve an assignee of the duties of affirmative performance under Section 2-210(4) of the Code, then as previously stated, such a holding is clearly erroneous and conflicts with a decision by the Court of Appeals for the Third Circuit. Such being the case, the desirability of promoting uniform application of the Uniform Commercial Code throughout the states warrants review at this time by the Supreme Court.

Article 2 of the Uniform Commercial Code is entitled "Sales." A sale is defined in Section 2-106 as ". . . the passing of title from the seller to the buyer for a price." As stated in Bunn, Snead and Speidel, *An Introduction to the Uniform Commercial Code* (1964), at page 30:

"There are many business transactions where, by contract, the possession of goods is transferred from the owner to another person for a consideration. Illustrations are a lease of goods, a pledge or a bailment for service. *While these are transactions in goods they are not within the scope of Article 2.* Article 2 covers the business transaction where, by agreement, the ownership of goods, i.e., title, is transferred from a seller to a buyer for a price." (Emphasis added.)

The instrument involved herein was a lease of goods (R. 4). It was not a sale. The lease specifically provides that: ". . . in no event shall it be construed as a Conditional Bill of Sale" (R. 5). Title to the goods did not pass from the lessor (Bowl-Mor) to the lessee (Noblett).

The United States District Court for the Western District of Pennsylvania in *In the Matter of Advance Printing & Litho Co.*, 277 F.Supp. 101 (W.D. Pa. 1967), rejected an argument that a section of Article 2 applied to a security transaction by stating at page 105:

"The Referee in his discussion referred to Pa. Uniform Commercial Code 12 A.P.S. §2-302 relating to unconscionable contracts. This section permits a Court to refuse to enforce such a contract, or in certain situations to limit an unconscionable result. But it is clear that Section 2-102 takes a security transaction without the scope of that article in the Code. Thus, the cited section does not assist the trustee in avoiding payment of the Rosenthal claim."

The Third Circuit affirmed the District Court based ". . . on its well-reasoned opinion." *Advance Printing & Litho Co.* v. *Bentz*, 387 F.2d 952 (3 Cir. 1967).

It should therefore be clear that the instant parties did not need to contract with reference to Section 2-210(4) because Article 2 did not apply. The assignment of the lease from Bowl-Mor to petitioner was a transaction subject to Article 9 since it was an assignment of chattel paper, as defined in Section 9-105(b). See Section 9-102 of the Uniform Commercial Code, which is reprinted in Appendix D.

If, on the other hand, the Court of Appeals for the Tenth Circuit means to say that Section 2-210(4) doesn't "necessarily" govern secured transactions, but was used by analogy to demonstrate that the waiver of affirmative performance is not the same as waiver of defenses for nonperformance, then the Appellate Court has nevertheless misinterpreted Section 2-210(4) in failing to recognize that where a financing assignment is involved, there is no delegation of duties of the assignor.

Section 2-210(4) of the Uniform Commercial Code provides as follows:

> "(4) An assignment of 'the Contract' or of 'all my rights under the contract' or an assignment in similar general terms is an assignment of rights and *unless the language or the circumstances* (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract." (Emphasis added.)

The Lease Agreement expressly provides that it should be ". . . interpreted in accordance with the laws of

the Commonwealth of Massachusetts. . . ." A 1964 decision of Massachusetts' highest Court in *Chatham Pharmaceuticals, Inc.* v. *Angier Chemical Co., Inc., et al.*, 347 Mass. 208, 196 N.E.2d 852, recognized the important distinction between (a) an assignment of rights only and not of obligations; and (b) an assignment of rights and obligations. The Supreme Judicial Court of Massachusetts held that from a consideration of *the circumstances*, the case belonged in the former category, even though the assignment was in general terms and there was no language absolving the assignee of responsibility for the assignor's obligations.

The Official Comment to Section 2-210(4) recognizes the distinction between a commercial assignment and a financing assignment. Official Comment Number 5 states as follows:

> "5. Subsection (4) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a *financing assignment* in which only the assignor's rights are transferred." (Emphasis added.)

While a commercial assignment would perhaps require express language in order to negate the duty of affirmative performance by the assignee of the assignor's obligations, a financing assignment excludes any contemplation that a financial institution might be held accountable for these affirmative obligations. Hence, no express language is required of a financing agreement in order to preclude the delegation of duties of the assignor.

It appears that the conclusion of the Court of Appeals for the Tenth Circuit that the waiver clause was designed

by the lessor to eliminate such a non-existent duty on the part of the assignee is based upon an unwarranted assumption that the draftsmen of the lease and the parties who signed it were ignorant of the provisions of applicable law. Moreover, to so interpret the waiver clause renders it superfluous and meaningless and violates the basic rule of construction, that all portions of a contract should, if possible, be construed in a manner that would give them effect and render them meaningful.

No clause in the Rental Lease was needed to relieve the assignee (petitioner) of the responsibilities for the assignor's warranties or prospective performance. See the discussion by Professor Grant Gilmore in Volume 2, § 41.5, page 1092, *et seq.* of *Security Interests in Personal Property* (1965), wherein he states:

> "Between buyer and seller's assignee, however, the breach of warranty or failure of consideration is available only defensively; if a buyer wishes to recover his down payment or his damages, he must go directly against his seller. *The assignee, who comes in to finance the transaction, does not thereby become responsible for the assignor's warranties or prospective performance.*" (Emphasis added.)

There Was a Waiver of Defenses Under Section 9-206(1)

Since there was no other reason for putting the provision (waiver clause) in the Rental Lease, the Court should determine that the language of the lease, *taken in its entirety,* was a waiver of defense agreement under Section 9-206(1).

Section 9-206(1) of the Uniform Commercial Code provides as follows:

"9-206 AGREEMENT NOT TO ASSERT DEFENSES AGAINST ASSIGNEE; MODIFICATION OF SALES WARRANTIES WHERE SECURITY AGREEMENT EXISTS.

"(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who, as part of one transaction, signs both a negotiable instrument and a security agreement makes such an agreement."

The language of the Rental Lease (R. 4) contains the *unconditional* promise of the lessee (respondent) to pay rent:

> "The Lessee agrees that the total to be paid as rental under the original term of this lease is ($79,200.00) Dollars, seventy-nine thousand two hundred and no/100 dollars which sum the Lessee *unconditionally* promises to pay in advance to the Lessor or *its order,* at such place as the *Holder* hereof may designate . . ." (Emphasis added.)

This provision is immediately followed in the lease by the waiver of defense clause which provides:

> "The lessor may assign all its rights, title and interest under this lease, including the payments due hereunder, but the assignee shall not be responsible for any of the lessor's obligations. *The obligations of the lessee shall, however, continue in full force and effect.*" (Emphasis added.)

The Court of Appeals for the Tenth Circuit held that respondent merely agreed that he would not endeavor to enforce any obligations against the assignee and that this did not preclude him from asserting defenses against petitioner. Such an interpretation totally ignores the effect of the language of the second sentence in the waiver clause. It is in that sentence of the agreement following his consent and exoneration, that the lessee-respondent agrees, however, that his obligation shall continue in full force and effect. What obligation? The obligation to pay! This is the primary obligation of the lessee under the lease agreement. He reiterated this continuing obligation to make the payments notwithstanding the assignment and exoneration.

How can a lessee maintain that he reserves the right to assert defenses against an assignee when he specifically reiterates his continuing obligation to pay! The language to which respondent agreed simply cannot be anything other than a cut-off of defenses as authorized by Section 9-206(1) of the Uniform Commercial Code.

The Appellate Court seemingly concluded that the interpretation of this clause as a waiver of defense would be unduly harsh to respondent. The hard facts of a particular lessee's position must not become the basis for promulgating a decision which will confuse and confound commercial transactions as to the intent, construction, and application of the Uniform Commercial Code. Disputes between original sellers and buyers, or lessors and lessees, should be settled directly between them and there is no valid consideration of public policy which forbids the assignee in a commercial transaction from acquiring by contract a position free from such disputes.

The opinions of the Court of Appeals for the Tenth Circuit completely disregard previous judicial interpretations of the identical clause in this lease. In *General Electric Credit Corporation v. Brick Plaza Lanes, Inc., et al.*, the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L25891-64, A-18908 (1966), interpreted the lease as containing a valid waiver of defense clause, and a copy of that Court's opinion is attached as Appendix E. The opinions are also at variance with Judge Eubanks' well-reasoned opinion in *General Electric Credit Corporation* v. *Noblett*, 268 F.Supp. 984 (W.D. Okla. 1967). The Appellate Court further disregarded the interpretation of a somewhat similar clause in *Baldino* v. *ABC Appliance Service*, 83 Pa. D & C 305 (Philadelphia County, 1952), which is attached to petitioner's brief as Appendix F. Respondent cited no cases involving similar clauses wherein said clause was not interpreted as a waiver of defense clause.

The purpose of the provision in the lease was to create a waiver of defenses. Another provision in the lease lends further weight to petitioner's position. The lease provides:

> "The Lessee agrees that the total to be paid as rental under the original term of this lease is ($79,200.00) Dollars, seventy-nine thousand two hundred and no/100 dollars which sum the Lessee *unconditionally* promises to pay in advance to the Lessor or *its order*, at such place as the *Holder* hereof may designate . . ." (Emphasis added.)

This provision of the lease was *not considered* in the Appellate Court's opinions. The effect of this provision and the agreement that the assignee shall not be responsible

for any of the lessor's obligations and that the obligations of the lessee shall continue is to create a waiver of defenses under Section 9-206(1).

By *unconditionally* promising to pay the rent to the lessor or holder of the lease, the lessee (respondent) is estopped from now asserting as far as the assignee (petioner) is concerned that such language does not mean what it says, but is conditioned upon the lessor's (Bowi-Mor) performing its obligations under the lease. A financial institution such as petitioner has the right to rely upon the contractual language contained in the lease. Also, the *unconditional* promise of the lessee to pay rent is an independent covenant and is in no way dependent upon the lessor's performing its obligations under the lease.

By failing to recognize this as a true waiver of defense clause the Court of Appeals for the Tenth Circuit has thwarted one of the major purposes of the Uniform Commercial Code, which is to elevate substance over form. No special combination of words should be necessary to bring into operation the waiver provision of Section 9-206(1). The purpose of Section 9-206(1) was to create the same result irrespective of whether a waiver clause was put in the original document between the lessor and lessee or whether the lessee executed a note in connection with the transaction. The Code in this setting was looking past the bare form of the transaction to the realities that surround contemporary commerce and commercial financing.

As is stated by Professor Homer Kripke in the Practice Commentary to McKinney's Consolidated Laws of New York Annotated, § 9-206:

> "The Code's conclusion, except for consumer goods, harmonizes with the Code's regular thrust toward the abolition of formal differences. Obviously, if a bank made a loan with which the borrower bought goods, the borrower could not defend against his loan on the ground that he was not happy with the goods. The use of credit sales by sellers, with the banks almost immediately stepping into the seller's position as to the credit obligations, is simply another legal mechanism which reaches the same ultimate result. Thus, there is little reason for the bank to end up in a more exposed position when it obtains the credit obligation through the seller."

In the present case respondent has made an *unconditional promise to pay*, as in a negotiable instrument. See Section 3-104 of the Uniform Commercial Code. The document has been assigned to petitioner containing a clause absolving the assignee of all responsibility for the lessor's obligations and the lessee has reiterated that his obligations shall continue. Petitioner should be able to rely on these adjoining representations and take free from defenses against the lessor in the same manner as if petitioner had loaned respondent the money to buy the bowling machines and taken a note and security interest in the property. Any other conclusion recognizes form over substance.

There is no reason why the Court should give Section 9-206(1) a narrow, begrudging construction. Rather Section 9-206(1), which applies to assignments of both security agreements and leases, should be liberally construed so as to facilitate the free movement of chattel paper in the commercial world. See Section 1-102(1) of the Uniform Commercial Code.

The Appellate Determination of Intent Is Erroneous

The Court of Appeals for the Tenth Circuit erred in referring to a subsequent document to interpret the meaning of a prior document between different parties.

The original opinion refers to the assignment from Bowl-Mor to appellee (R. 7) in an endeavor to determine the "intent and meaning" of the lease clause involved herein. It is difficult to see why the Appellate Court made such a reference.

There is no need for an assignment to contain an exhaustive summary of the provisions of the lease and the insertion of clauses in this subsequent document cannot affect the earlier one. The clause in the lease must stand or fall on its own wording with reference to the commercial setting in which it was drafted. Resort to this subsequent document by the Appellate Court was improper.

With regard to a determination of the intent of the parties, the Court of Appeals for the Tenth Circuit completely disregards the effect of the second sentence of the waiver clause which states: "The obligations of the Lessee shall, however, continue in full force and effect." The insertion of this particular language in the lease agreement cannot be ignored by an interpretative court and the use of *"however"* in this context must be given recognition. It is respectfully submitted that other interpreters of the Uniform Commercial Code will have a deplorable difficulty in understanding the reason for its inclusion in the rental lease other than to make intentionally specific that the lessee was purposefully clarifying that he was knowingly cutting off the assertion of any of the usual defenses insofar as the financing assignee (petitioner) was concerned.

The primary obligation of the lessee was the unconditional promise to pay rent. By virtue of this contractual sentence and the succeeding one, respondent has agreed that the lease may be assigned, that the assignee shall not be responsible for the obligations of the lessor and that his *unconditional* promise to pay rent shall continue. This has to mean the same thing as saying that the lessee waives any defenses insofar as the assignee is concerned. The failure to recognize this creates a rule of law which requires magic phrases in order to bring Section 9-206(1) into effect, when the reasonable import of the words employed should do so. *The Appellate Court's failure to interpret the contractual clause as a waiver provision is tantamount to making a nullity of the second sentence of the clause.* The opinion renders it absolutely meaningless and violates the fundamental rule of construction that all provisions of a contract should, if possible, be given effect.

Footnote 4 of the Appellate Court's initial opinion raises the further inappropriate suggestion that the fact that this lease is on a printed form of the lessor is relevant to this case. Resolving ambiguities against the drafter can have no relevance, since the drafter (Bowl-Mor) is not a party to this lawsuit. If the language is to be construed against anyone, it should be respondent, who participated in the original transaction and not petitioner, who at a subsequent date took an interest in the lease for value, in good faith and without notice of any claim or defense.

If the Court is unable to render an appropriate interpretation of the waiver provision without treating it as superfluous, then in the interest of justice, fair play, and the future effect of this decision on financing arrange-

ments, the entire matter would be better referred back to the trial court for evidence and determination as to the intent of the parties in this particular transaction. Such was the final conclusion of the Supreme Court of the State of New York, Appellate Division—Fourth Department, attached as Appendix G, in *General Electric Credit Corporation* v. *Ludwig Beyerlein*, — A.D.2d —, involving the identical lease provision, wherein the Appellate Division denied Summary Judgment, but remanded to the trial court to determine the intent of the parties. Rather than treat the language of the lease as superfluous, the very least the Court of Appeals for the Tenth Circuit should have provided is for a fact determination of the parties' intent at the trial level.

The Prediction as to Massachusetts Law Is Erroneous

The Court of Appeals for the Tenth Circuit erred by attempting to predict how a Massachusetts court would interpret the language involved herein. The Appellate Court relied on a case which is patently inapplicable, namely *Quality Finance Company* v. *Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958).

The Appellate Court erred in its reference to the *Hurley* case as setting forth the general policy of Massachusetts on waiver of defense clauses. It should be apparent that *Hurley* is inapplicable because it was a pre-Uniform Commercial Code decision and involved "consumer goods." The initial opinion correctly determined that the bowling machines involved herein were not "consumer goods." The policy espoused in *Hurley* is to be limited to consumer goods cases and its application to the present

case is clearly erroneous. The general policy of Massachusetts regarding waiver of defense clauses in non-consumer transactions is to be found exclusively in the wording of Section 9-206(1) of the Uniform Commercial Code, which was specifically amended by the Massachusetts Legislature in 1963 to make the waiver applicable to a *lessee* and this has been the policy with respect to lease transactions since that time.

Since the decision by the Court of Appeals for the Tenth Circuit denying appellee's Petition for Rehearing, the Supreme Court of the State of New York, Appellate Division—Fourth Department in *General Electric Credit Corporation* v. *Ludwig Beyerlein, supra,* has unanimously rejected the reliance on *Quality Finance Co.* v. *Hurley, supra,* as creating an exception to 9-206(1). The Appellate Division said: "Since the personal property in question is not consumer goods, the reliance of the Court below on Quality Finance Co. v. Hurley (supra) as creating an exception to Section 9-206 of the Massachusetts Uniform Commercial Code was mistaken." This decision of the Appellate Division does support petitioner's contention that other courts are arriving at results contrary to the opinion of the Court of Appeals for the Tenth Circuit involving the same situation. In the interests of preserving the uniform application of the Uniform Commercial Code, the Supreme Court of the United States will eventually have to resolve the issue.

CONCLUSION

Consistent with the argument that has gone before, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES D. FELLERS
2700 First National Building
Oklahoma City, Oklahoma 73102

Counsel for Petitioner

of Counsel:

FELLERS, SNIDER, BAGGETT, BLANKENSHIP & BOSTON
2700 First National Building
Oklahoma City, Oklahoma 73102

August, 1968

APPENDIX A

GENERAL ELECTRIC CREDIT CORP.,
Plaintiff,

v.

Ernest V. NOBLETT, Defendant.

Civ. No. 66-375
United States District Court
W. D. Oklahoma.

May 29, 1967.

Action by assignee of lessor of bowling pin setting machine to recover from lessee the accelerated balance due under the lease. On plaintiff's motion for summary judgment, the District Court, Eubanks, J., held that affidavit and answer of lessee alleging that there were writings to corroborate his claim that he was not individually liable under lease and that he was attempting to locate those writings presented fact issue precluding summary judgment. The Court further held that under lease providing that lessor might make an assignment but that assignee should not be held responsible for any of lessor's obligations, assignee was not barred from recovering accelerated balance by lessor's alleged breach of warranty, disregard of agreement to provide on the job training and failure to make allowance for advertising, even though lessor had become bankrupt.

Motion denied.

1. Evidence Key # 384

Parol evidence cannot be allowed to vary or contradict the terms of a written instrument.

2. Novation Key # 7

Lessee who signed lease as individual could not defend action to recover payments due thereunder on ground

that he and lessor had agreed that liability would be shifted to corporate entity upon its incorporation unless he was able to produce written evidence that only corporation was to be responsible under the lease and unless he was able to establish that lessor had notice of that condition.

3. Federal Civil Procedure Key # 2505, 2539

In action to recover payments due under lease of bowling pin setting machines, affidavit and answer of lessee alleging that there were writings to corroborate his claim that he was not individually liable under lease and that he was attempting to locate those writings presented fact issue, precluding summary judgment.

4. Set-Off and Counterclaim Key # 3

Uniform Commercial Code provision stating that an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by assignee who takes his assignment for value, in good faith and without notice of a claim or defense repealed, in effect, statute providing that assignee may maintain an action but subject to all defenses and rights of counterclaim, recoupment or setoff which would have been available if action had been brought in name of assignor. M.G.L.A. c. 106 § 9-206(1); c. 231 § 5.

5. Bailment Key # 21

Under lease providing that lessor might make an assignment but that assignee should not be held responsible for any of lessor's obligations, assignee was not barred from recovering accelerated balance due under lease by lessor's alleged breach of warranty, disregard of agreement to provide on the job training and failure to make allowance for advertising, even though lessor had become bankrupt.

Gary C. Rawlinson, of Fellers, Snider, Baggett & McLane, Oklahoma City, Okl., for plaintiff.

Val R. Miller, of Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, Oklahoma City, Okl., Paul D. Sullivan, of Leach & Sullivan, Duncan, Okl., for defendant.

MEMORANDUM OPINION

EUBANKS, District Judge.

Plaintiff commenced this diversity action on October 5, 1966, alleging generally in its complaint that defendant and Bowl-Mor Company, Inc., entered into a written contract on May 20, 1965 whereunder defendant leased from Bowl-Mor eight automatic ten pin setting machines. According to the terms of that rental lease contract defendant agreed to pay, in installments, certain specified sums of money for the use of the machines, the first installment becoming due on September 6, 1965. The rental lease agreement provided, among other things, that "The Lessor (Bowl-Mor) may assign all its right, title and interest under this lease, including the payments due hereunder, but the Assignee shall not be held responsible for any of the Lessor's obligations. The obligations of the Lessee (Noblett) shall, however, continue in full force and effect."

The complaint alleges further that Bowl-Mor assigned the rental lease agreement to plaintiff on May 24, 1965, and thereafter the defendnat made two installment payments as was required of him but defaulted on the installment due September 20, 1965, and has made no payments since. Recovery is sought for the accelerated balance due under the lease after deducting the proceeds of the sale of the machines. (By agreement of both parties such sale has been accomplished since this suit was filed.)

By way of answer the defendant admits the execution of the rental lease agreement and does not deny his default but raises two defenses. (1) That he is not individu-

ally obligated because it was agreed between him and Bowl-Mor that the contract be signed by him as an individual only to expedite delivery of the machines, but that it was understood that as soon as he formed a corporation, Marlow Lanes, Inc., all of lessee's responsibility under the contract would be shifted to that corporate entity. In this part of his defense defendant says plaintiff had notice of such understanding between him and Bowl-Mor and subsequently recognized Marlow Lanes, Inc., (the corporation which was indeed formed) as the obligor thereunder. (2) That the machines were not as warranted and represented to him in that they were defective and would not operate efficiently. Also defendant claims a breach of further provisions of the agreement to allow him an advertising and sign allowance and a failure on lessor's part to provide an agreed "on-the-job training" for employees. Defendant contends that this second defense amounts to a failure of consideration for the contract.

The case is now before the Court on motion of plaintiff for summary judgment to which is attached the affidavit of R. N. Lamy, plaintiff's credit specialist, saying, in effect, that plaintiff took the assignment of the rental lease from Bowl-Mor for a valuable consideration, in good faith and without notice of any claim or defense which Noblett may have against Bowl-Mor. Responding to plaintiff's motion defendant substantially reiterates his two defenses in an affidavit but adds thereto by saying that there are writings that will corroborate his claim that he was not to be held individually obligated, which writings he is currently attempting to locate.

[1] Both parties agree that Massachusetts substantive law governs this matter because of contract provisions. Able counsel for both parties are apparently also in accord that irrespective of whether it is a matter of procedural law and thus governed by the rules of the forum, parole *(sic)* evidence cannot be allowed to vary or contradict the terms of a written instrument. With reference to the spe-

cific issue of individual or corporate liability it was said in Norfolk County Trust Co. v. Green, 304 Mass. 406, 24 N.E.2d 12 (1939), "but the written agreement purports on its face to bind the defendant and appears to set out a complete contract of the parties. Parol evidence to contradict or vary its terms was not admissible." For other cases holding that where there is nothing in the instrument to indicate the signer thereof acted otherwise than as an individual, or that a corporation was to be bound, a signer will not be heard to say he acted in a representative capacity only, see Ricker v. B-W Corp., 349 F.2d 892 (10th Cir. 1965); Mid-America Corp. v. Miller, 372 P.2d 14 (Okl.1962; and 82 A.L.R.2d 424).

[2, 3] For the foregoing reason the first defense herein must fail unless defendant is able to produce written evidence that only Marlow Lanes, Inc., was to be responsible under the lease and be further able to establish that plaintiff had notice of same. Since this is a possibility according to the affidavit and answer of defendant it follows that, as regards this point, plaintiff's motion for summary judgment must be, and accordingly is overruled.

The question relative to the second defense of Noblett presents a much more difficult problem. As noted above the lease contained a proviso that "Assignee (General Electric Credit Corporation, plaintiff herein) shall not be held responsible for any of the Lessor's (Bowl-Mor) obligations."

Whether the allegations in the answer and amendment thereto, to-wit: breach of warranty of fitness of the machines; disregard of the agreement to provide "on-the-job training"; and failure to make allowance for advertising and sign, be technically designated as "defense," "counterclaim" or "set-off" and regardless of whether defendant seeks recission of the contract or affirmance with damages to him because of the alleged breach, it is clear that all of the omissions complained of by him were obligations of Bowl-Mor, not plaintiff. It seems further to be clear from

the contract that plaintiff is exonerated from responsibility for all of these complaints unless the contract provision allowing same be invalid.

Section 9-206(1) of the Massachusetts Uniform Commercial Code provides: "Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense * * *."

[4] At the time the above statute was enacted the Supreme Court of Massachusetts had held in Quality Finance Co. v. Hurley, 337 Mass. 150, 148 N.E.2d 385, that "where a conditional sales agreement for an automobile provided that if the contract was purchased from seller the purchaser should have all the rights of the seller and the buyer waived as against the purchaser all defenses which the buyer might have against the seller, provision was invalid as contrary to the policy of the statute." Therein the court specifically found that such a "waiver of defenses" was in contravention of the express terms of Massachusetts G.L. (Ter.Ed.) C. 231, Sec. 5, as amended by St.1945, C. 141, Sec. 2, which (at the time) provided: "The assignee * * * may maintain an action thereon in his own name, but subject to all defenses and rights of counterclaim, recoupment or set-off which the defendant would have been entitled had the action been brought in the name of the assignor." The court in Hurley carefully examined the decisions from many jurisdictions and observed, "there is a conflict of authority whether such a waiver clause is valid." I do not have available the Statutes of Massachusetts so do not precisely know what happened to G.L. (Ter.Ed.) C. 231, Sec. 5, as amended by St. 1945, C. 141, Sec. 2, when, in 1958, that state enacted Sec. 9-206 of its Uniform Commercial Code but hold that the subsequent act in effect repealed the above excerpted por-

tion of the earlier one. Therefore if Hurley were again before the Supreme Judicial Court of Massachusetts a contrary result would obtain. Such opposite holding has since been reached by a trial court in New Jersey in a case involving a contract identical, in pertinent part, with the one in this case. See General Electric Credit Corporation v. Brick Plaza Lanes, Inc., Docket No. L 25891-64, A-13908, Superior Court of Ocean County, New Jersey.

Other cases holding to the same general effect are B-W Acceptance Co. v. Richmond, 46 Misc.2d 447, 259 N.Y.S.2d 965; Beam v. John Deere Co., 240 Ark. 107, 398 S.W.2d 218; and First National Bank of Elgin v. Husted, 57 Ill. App.2d 227, 205 N.E.2d 780. None of the cases cited by defendant involve an interpretation of similar contract provisions as related to the Uniform Commercial Code, Sec. 9-206. Although not involving the Uniform Commercial Code this very Court, through Judge Bohanon, upheld a contract provision whereby buyer agreed to settle all his claims against seller directly against seller and agreed not to set up any such claims against the assigns of seller. See Straight v. James Talcott, Inc., 10 Cir., 329 F.2d 1.

[5] Defendant still has his remedies as against Bowl-Mor although regrettably that concern is in bankruptcy. The unfortunate circumstances in which defendant finds himself in this case is no legal ground for violating his contract heretofore made. For the foregoing reasons I hold that the second defense plead herein is unavailable as against the plaintiff.

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
APR 2 1968
William L. Whittaker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9704—JANUARY TERM, 1968

ERNEST V. NOBLETT, Appellant,	:	
vs.	:	Appeal From the United States District Court For the Western District of Oklahoma
GENERAL ELECTRIC CREDIT CORPORATION, Appellee.	:	

Val R. Miller (Paul D. Sullivan, with him on the brief) for Appellant.

Gary C. Rawlinson and James D. Fellers for Appellee.

Before MURRAH, Chief Circuit Judge; LEWIS, Circuit Judge, and CHRISTENSEN, District Judge.

CHRISTENSEN, District Judge.

In this diversity action General Electric Credit Corporation obtained summary judgment against Ernest V. Noblett for rentals under a bowling equipment "Rental Lease," which had been assigned to the corporation by the lessor, Bowl-Mor Company.

Whether the case was factually ripe for summary judgment and whether Noblett in the rental agreement validly waived defenses as against the assignee as a matter of law, are the problems presented by this appeal.

Noblett's answer as amended had raised among other defenses that of failure of consideration by reason of alleged breaches of an express warranty against defects, an implied warranty of fitness and the obligations of the lessor to furnish advertising and training assistance.

The rental agreement included the following provision:

> "The lessor may assign all its right, title and interest under this lease, including the payments due hereunder, but the assignee shall not be held responsible for any of the lessor's obligations. The obligations of the Lessee shall, however, continue in full force and effect."

Applying Massachusetts law in accordance with the terms of the rental agreement, and being of the view that Noblett thereby had waived the pleaded defenses, General Electric Credit Corp. v. Noblett, 268 F. Supp. 984 (W.D. Okl. 1967), the trial court granted summary judgment for the balance of the rentals in the sum of $64,389.91, together with interest of $3,541.45, $11,814 attorney's fees and costs of the action.

Section 9-206, Chapter 106, of the General Laws of Massachusetts, based upon the Uniform Commercial Code, provides:

> "(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim

or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3) . . ."

The equipment did not constitute "consumer goods" within the meaning of the Act.

The appellant Noblett contends that under any view of the Massachusetts law this case was not ripe for summary judgment since there was an issue of fact whether the assignee credit corporation took the assignment "for value, in good faith, and without notice of a claim or defense"; if not, under the terms of the Code no waiver agreement would be recognized.

In support of its motion for summary judgment the credit corporation filed below an affidavit from one R. N. Lamy, who stated that he was a Credit Specialist for General Electric Credit Corporation; that on the 24th day of May, 1965, General Electric Credit Corporation took an assignment from Bowl-Mor Company, Inc., for "good and valuable consideration" of the lease in question and "that said assignment was taken by General Electric Credit Corporation in good faith and without notice of any claim or defenses which Ernest V. Noblett might have against Bowl-Mor Company, Inc".

We are not unmindful of the practical difficulties of establishing by affidavit in strict compliance with Rule 56(e), F.R.C.P., a lack of notice on the part of a corporation having numerous officers, managing agents and employees. A reasonable application is all that is required. It is apparent that in any view this affidavit did not conform with the requirements that such an affidavit be made on personal knowledge, state facts which would be admissible in evidence and show affirmatively that affiant was competent to testify to the matters therein stated. See Zampos v. United States Smelting and Refining and Min. Co., 206 F.2d 171 (10th Cir. 1953). Cf. Bumgarner v. Joe Brown

Company, 376 F.2d 749 (10th Cir. 1967); Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960).

But at no time did the appellant indicate to the court below, directly or indirectly, that he questioned the sufficiency or effect of the affidavit. His affidavit in response to the motion was confined to assertions that Bowl-Mor had failed to perform its obligations and that there had been an understanding that a corporation to be organized by Noblett rather than he personally was to be liable for rentals. No denial or other reference was made to the Lamy affidavit on the question of notice. Noblett asked, and was granted, leave to make a further search and showing concerning his claim that there was some writing relieving him from personal responsibility. No such showing was made and no further affidavit was submitted. The appellant did not indicate to the trial court in any way that he questioned the form, substance or effect of the affidavit.

It was said long ago and observed in various applications since that "Errors as a rule to be reviewable on appeal must be definitely and timely called to the attention of the trial court in order to afford a fair opportunity for it to pass upon the matter to correct its own errors, if any." Scritchfield v. Kennedy, 103 F.2d 467 (10th Cir. 1939). An affidavit that does not measure up to the standards of 56(e) is subject to a motion to strike; and formal defects are waived in the absence of a motion or other objection. 6 Moore's Federal Practice § 56.22(1) p. 2817; 3 Barron and Holtzoff, Federal Practice and Procedure § 1237, p. 171; Auto Drive-Away Company of Hialeah, Inc. v. I.C.C., 360 F.2d 446 (5th Cir. 1966); United States v. Western Electric Co., 337 F.2d 568 (9th Cir. 1964); Klingman v. National Indemnity Company, 317 F.2d 850 (7th Cir. 1963). Cf. Wagoner v. Mountain Savings and Loan Association, 311 F.2d 403 (10th Cir. 1962).

The reliance of the trial court under the circumstances upon the sufficiency of the affidavit is completely understandable. The belated claim of error in such respect could

be persuasive only to prevent a gross miscarriage of justice. Such is not the case here; there is a more dispositive reason why the summary judgment cannot stand.

The trial court determined that in agreeing that "the Assignee shall not be held responsible for any of the Lessor's obligations", and that "the obligations of the Lessee shall, however, continue in full force and effect", Noblett effectually indicated "that he will not assert against an assignee any claim or defense which he might have against the . . . Lessor" within the contemplation of § 9-206(1), and, hence, that he was barred from asserting against the appellee his defense of failure of consideration and related defenses.[1]

Our attention has been directed to two unpublished decisions of courts in other states holding that the precise language used in the form of the lease in question is valid and binding under Massachusetts law for the purpose.[2] And we are mindful that in Straight v. Talcott, Inc., 329 F.2d 1 (10th Cir. 1964), this court held that an agreement of a buyer that he would settle all claims against the seller directly with him and would not set up any such claim against his assignee, operated to waive defenses in a suit brought by the assignee.

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1 "Whether the allegations in the answer and amendment thereto, to-wit: breach of warranty of fitness of the machines; disregard of the agreement to provide 'on the job training'; and failure to make allowance for advertising and signs, be technically designated as 'defenses', 'counterclaim' or 'set-off' and regardless of whether defendant seeks rescission of the contract or affirmance with damages to him because of the alleged breach, it is clear that all of the omissions complained of by him were obligations of Bowl-Mor, not plaintiff. It seems further to be clear from the contract that plaintiff is exonerated from responsibility for all of these complaints unless the contract provision allowing same be invalid".

2 General Electric Credit Corporation v. Brick Plaza Lanes, Inc., et al., Superior Court of New Jersey Law Division, Ocean County, Docket Number L25891-64, A-13908 (1966), and Baldino v. ABC Appliance Service, 83 Pa. D. & C. 305 (Philadelphia County, 1952).

No Massachusetts decision has been called to our attention, nor can we find any, defining how far from the precise language of the authorizing statute an agreement might depart and still be effective as a waiver. Neither the decision of the trial court nor any of the cases cited come to grips expressly with the most persuasive phase of appellant's argument—that the intent manifested by the quoted provision of the lease agreement was not to waive defenses as allowed by § 9.206(1) of the Uniform Commercial Code but to relieve the assignee of the duty of affirmative performance of the lessor's obligations under the lease with reference to an entirely different section of the Code. It is provided in § 2.210:

> "(4) An assignment of 'the contract' or of 'all my rights under the contract' or any assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract."

The provisions of the lease agreement which speaks in terms of obligations is peculiarly suited to an indication for the purposes of § 2.210(4) that there was no "delegation of the performance of the duties of the assignor" or a "promise by him to perform those duties." Indeed, more apt language for this purpose could hardly be devised than was used in the lease agreement. But with respect to waiver of defenses, the language at best is indirect and unclear and at its worst misleading or entrapping. The question of the appropriateness of language, however, is not the worst of the problem, which goes deeper into the very substance of the legal concepts involved.

An assignment in general terms under the Uniform Commercial Code, and, hence, under the present Massa-

chusetts law, is an assignment of rights, and unless the language or the *circumstances* indicate the contrary, it is also a delegation of performance of the duties of the assignor and its acceptance by the assignee, constituting a promise by him to perform those duties. The promise is enforceable by either the assignor or the other party to the original contract. In general, whether there is a delegation of duties as well as rights in and of itself does not affect defenses available to the other original contracting party. If there is a delegation of obligations, failure of consideration remains a defense, and the same is true even though there is no delegation of obligation to the assignee in the absence of waiver; the assignee stands in the shoes of the assignor as far as the right to recover is concerned in either event. Moreover, if there is a delegation of obligation to the assignee, this in and of itself does not relieve the assignor from the obligation of performance. If the assignor is required to respond to the other contracting party after duties have been delegated by the assignor, the assignee may be rendered liable to the assignor, which is a reason why a non-delegation agreement may be important to the assignee in the absence of a waiver of defenses.[3]

The point of these general principles is that defenses are available against the assignee in the absence of waiver, not because of the delegation or non-delegation of duties but because the assignee in either event must claim under the original contract and is subject to the defenses allowed thereby. The fact that the lease recited that the lessee should continue to be bound to his contracted obligations despite any assignment does not suggest in context that he

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[3] See generally William D. Hawkland, *A Transactional Guide to the U.C.C.* (A.L.I.) (1964), § 1.25 p. 150 et seq.; 6 Am. Jur.2d *Assignments*, § 102, p. 282; 3 Williston on Contracts (Third Ed—Jaeger), Sec. 432 pp. 177, et seq. Cf. Nickell v. United States, 355 F.2d 73 (10th Cir. 1966); Denver United States Nat. Bank v. Asbell Bros. Constr., 294 F.2d 289 (10th Cir. 1961); Imperial Refining Co. v. Kanotex Refining Co., 29 F.2d 193 (8th Cir. Kans. 1928).

agreed to waive defenses any more than the agreement that responsibilities of the assignor were not to be deemed delegated had anything to do with the waiver of defenses. The intent and meaning of the lease in this respect is made all the more clear by Bowl-Mor's assignment to the credit corporation which simply provides on the point that "Assignee shall have no obligations of lessor under said lease."

Whether responsibilities of the assignor were or were not delegated pursuant to § 2-210(4), or as a matter of general law, the rule continued operative that failure of consideration could be raised as a defense either against the assignee or the assignor in the absence of a waiver as authorized by the other provision of the Code. There was no such waiver. To enlarge the agreement concerning the non-delegation of obligation into such a waiver would be not only unwarranted but unfair. When appellant consented to the non-delegation to the assignee of obligations of the assignor under the lease, whether viewed from the standpoint of one learned in the law and capable of appreciating these distinctions, or as one only generally aware of the meaning of language, he reasonably could have assumed that the purpose was what it purported to be and was not to preclude his defenses should he not receive the consideration for which he bargained. We are of the opinion that as a matter of law there was no waiver of defenses.[4]

We see nothing in Straight v. Alcott, Inc., 329 F.2d 1 (10th Cir. 1964), *supra*, that warrants a contrary conclusion. There Oklahoma law was involved; the language which was employed more specifically sustained the con-

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[4] Even if the contract had been ambiguous on this point, summary judgment would have been inappropriate, since the appellant would have had the right to be heard on the question of intent as a matter of fact, and to resort to intrinsic aids to establish that intent at the trial. The lease agreement bears the letterhead of the lessor and appears to be on its printed form, and the rule of interpretation that in such event ambiguities are to be resolved against the drafter could well apply.

clusion reached and was not apparently designed for another purpose; it was not expressly questioned that the provision was intended to waive defenses, and the primary issue was whether such an agreed waiver would be valid under Oklahoma law. Massachusetts law governs the result here. In view of considerations discussed above and the general policy expressed in Quality Finance Company v. Hurley, 337 Mass. 150, 148 N.E.2d 385 (1957) it is fairly to be predicted that in the interpretation of the subsequently adopted Uniform Commercial Code an agreement that an assignment would not constitute a delegation of duties would not be so broadly construed as to be accepted in that state as a waiver of defenses under § 9.206(1).

REVERSED and remanded for further proceedings not inconsistent with this opinion.

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit
JUN 20 1968
William L. Whittaker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9704—JANUARY TERM, 1968

ERNEST V. NOBLETT,	:	
Appellant,	:	
vs.	:	On Petition for Rehearing
GENERAL ELECTRIC CREDIT CORPORATION,	:	
Appellee.	:	

PER CURIAM.

Appellee has filed a petition for rehearing, its only contention justifying further notice being that the court has held in effect that the "Sales" provisions of the Uniform Commercial Code govern "Secured Transactions." In other words, it is argued that "the application of Section 2-210(4) was erroneous" and would open all secured transactions to question by indicating that in the absence of specific negation the obligation of performance would be placed upon the security holder as a matter of course. It should have been enough to preclude such misunderstanding to quote,

as we did, Section 2-210(4) which states among other things that there is a delegation of performance "unless the language or the circumstances (as in an assignment for security) indicate the contrary" (emphasis added). We did not refer to Section 2-210(4) to indicate that the "Sales" provisions of the Code necessarily governed Secured Transactions in the absence of language so providing but rather to demonstrate that waiver of affirmative performance is not the same as waiver of defenses for nonperformance by a party to the original contract.

Far from justifying the appellee's claim that we misconceived the relationship of the Sales provisions to the Secured Transactions provisions of the Code, we simply pointed up in our opinion the basic misconception implicit in appellee's argument that language in the rental agreement which would have been appropriate for purposes of Section 2-210(4) relating to Sales could serve the entirely different purpose of satisfying the waiver of defense requirements established in Section 9-206(1) concerning Secured Transactions.

Finally, appellee sees in the language of the rental agreement that "the assignee shall not be responsible for any of lessor's obligations", an enigma if it is not held to constitute a waiver of defense by the lessee since in a secured transaction an assignment does not delegate performance in any event. Perhaps appellee is in the best position to explain this supposed enigma; in the assignment by which it took the security it was again stipulated that "assignee shall have no obligation of lessor under the lease". The same question applies—why, if there would be no such obligation anyway, was this specifically provided there? No matter the reason, such language does not operate as a waiver of defenses under Section 9-206(1) and this is the determinative point.

The petitions for rehearing and for rehearing en banc are denied.

APPENDIX D

STATUTES

2-106(1)

Sec. 2-106. (1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2—401). A "present sale" means a sale which is accomplished by the making of the contract. * * *

9-105(b)

Sec. 9-105. (1) In this Article unless the context otherwise requires:

* * * * * *

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods [; a charter or other contract involving the use or hire of a vessel is not chattel paper]. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

9-102

Sec. 9-102. (1) Except as otherwise provided in Section 9-103 [¶703] on multiple state transactions and in Section 9-104 [¶704] on excluded transactions, this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents,

instruments, general intangibles, chattel paper, accounts or contract rights; and also

(b) to any sale of accounts, contract rights or chattel paper.

(2) This Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article does not apply to statutory liens except as provided in Section 9-310 [¶745].

(3) The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply. [Comp. at ¶ 101, 105, 500.]

3-104

Sec. 3-104. (1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

(a) a "draft" ("bill of exchange") if it is an order;

(b) a "check" if it is a draft drawn on a bank and payable on demand;

(c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

(d) a "note" if it is a promise other than a certificate of deposit.

(3) As used in other Articles of this Chapter, and as the context may require the terms "draft", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable. [Comp. at ¶ 500.]

1-102(1)

Sec. 1-102. (1) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION. OCEAN COUNTY

Docket No. L 25891-64
A-13908

GENERAL ELECTRIC CREDIT CORPORATION,	:	
Plaintiff	:	
	:	Civil Action
v.	:	Opinion on Motion
BRICK PLAZA LANES, INC., a New Jersey corporation, et als,	:	
Defendants	:	

Decided: May 9, 1966

Appearances: Mr. Herman A. Adler,

for the Plaintiff

Mr. Gary O. Turndorf,

for the Defendants.

LARRABEE, J. C. C. (Temporarily Assigned) Plaintiff General Electric Credit Corporation sues Brick Plaza Lanes, Inc. and six other individual defendants: the Rubens, the Vogels and the Pallays contending that the Lanes rented bowling pin setting machines from Bowl-Mor, that the individual defendants guaranteed performance by the Lanes, that the lease was assigned to General; that the Lanes defaulted and that some $209,993.71 balance is due for the balance of rental.

Defendants deny the balance claimed and set up various defenses, i.e. violation of implied and express warran-

ties; voiding of the lease by repossession; claim of credit for cost of repairs and security deposit; claim of other credits given to the Lanes by Bowl-Mor when the Lanes had no notice of the assignment; fraud and misrepresentation by Bowl-Mor; that the assignment was without consideration; that General is the alter-ego of Bowl-Mor and that defenses against the latter are available against the former; that payments claimed constitute a penalty; that defendants have not received credit for fair market value; that the acts of General discharged the defendants from liability.

Defendants counterclaimed alleging misrepresentation by Bowl-Mor and now seek to file a Third Party Complaint alleging that Otis Elevator manufacturer and Bowl-Mor lessor warranted that the machines would be suitable for their intended use, but were negligently made.

Bowl-Mor represented that the machines had design features that would provide long life, trouble free, but they were defective.

The defendant seeks recovery and recission.

The Motion is opposed by General.

The lease was executed August 24, 1962. It provided that:

> "This lease shall be interpreted in accordance with the laws of the Commonwealth of Massachusetts."

The Statute law of Massachusetts then provided:

> "The Assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defenses and rights of counterclaim, recoupment or set off to which the defendant would have been entitled had the action been brought in the name of the Assignor."
>
> G. L. of Mass. (Ter. Ed.) C. 231 Sec. 5
> as amended in 1945.

Subsequent to the enactment of the Statute the Massachusetts Court held that the lessor who assigned his lease to an assignee could not bar the lessee from asserting against the assignee those defenses which he could have asserted against the assignor-lessor. *Quality Finance* v. *Hurley* 337 *Mass.* 150, 148 *N.E.2nd,* 385 (1958)

This decision and the Statute are considered because the lease contained an agreement that:

> "The Lessor may assign all its right, title and interest under this lease, including the payments due hereunder, but the Assignee shall not be held responsible for any of the Lessor's obligations. The obligations of the Lessee shall, however, continue in full force and effect."

Thus, it is contended by General that the clause rules out the basis for a Third Party Action, because it makes unavailable to Brick Plaza as defenses to the original complaint; the issues set up in the Third Party Complaint.

The Lanes contend that under the Massachusetts Statute and the Hurley case the issues set up in the Third Party complaint can be raised as defenses in the main suit, thus there is an identity of issues and the Third Party Action should be permitted.

In or about 1958 Massachusetts adopted the Uniform Commercial Code. *Sec.* 9-206 provided:

> "1. Subject to any Statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an Assignee any claim or defense which he may have against the Seller is enforceable by an Assignee, etc."

In October, 1963, the Massachusetts legislature amended the section as follows:

> "1. Subject to any statute or decision which establishes a different rule for buyers or lessees of con-

sumers goods, an agreement by a buyer or lessee that he will not assert, etc."

Thus the Massachusetts statute now permits the assignee to have the benefit of the clause except in the case of buyers or lessors of consumers' goods. The defendant in the Hurley case had purchased an automobile.

The 1945 statute is, subject to the exception, contrary to Sec. 9-206 which in effect, repeals the 1945 statute as to sales and leases but not the exception.

Read realistically it must mean that the exception applies only to consumers' goods and that the 1945 statute survives with regard to sales and leases only so far as it applies to consumers' goods.

In construing the contract, should the Court apply the law of Massachusetts as of 1962, as represented by the Hurley case, or the law as it is today? Certainly the parties to such a lease comprehend and are aware that the law changes from time to time. Thus the Massachusetts law as of today should apply.

This conclusion raises the question as to whether the Hurley case, which was in the area of consumers' goods, constitutes a precedent which would be followed today. It was a case of consumers' goods, in which the seller's contract contained a clause, similar to the one in the instant case, denying to a purchaser the right to raise against the assignee the defenses he had against the seller.

The Court held the waiver clause ineffective because of the 1945 statute, first; and secondly, because of the very strong public policy of protecting conditional vendees against "the imposition by conditional vendors and installment houses . . ." and third, because the waiver clause is an attempt to give a non negotiable agreement the attributes of negotiability."

Today a different result would be reached by the Massachusetts Court because the facts of the case fit into

the provisions of the *U.C.C. Sec.* 9-206 expressly provides that the waiver clause is effective in both sales and lessees except where consumers' goods are the subject matter. *Sec.* 9-206 also excepts instances where real defenses are available (see 12*A* 13-305). None of the defenses asserted fall within the scope of 305.

If the Hurley case was before the Massachusetts Court today, and if the subject matter was commercial apparatus, not consumers' goods, the decision would not be the same. *Sec.* 9-206 of the *U.C.C.* would impliedly repeal the 1945 statute because it is inconsistent with it when commercial appartus is the subject matter.

Sec. 9-206 of the *U.C.C.* points up the fact that the "public policy" referred to in Hurley is related to the field of consumers' goods.

Sec. 9-206 expressly deals with the objection that the waiver clause is an attempt to give to non negotiable paper the attributes of negotiability.

It expressly permits real defenses as distinguished from personal defenses, thereby recognizing the status of the contract or lease as comparable to that of a negotiable instrument.

Defendant further contends that the defense of fraud entitles the defendant to recission which would render the contract a nullity and that consequently plaintiff's rights would be subject to defendant's equity of recission.

However, the type of fraud alleged does not come within the scope of Section 3-305(c).

The Motion for permission to file a Third Party complaint is denied.

APPENDIX F

DISTRICT AND COUNTY REPORTS

BALDINO ET UX. v. ABC APPLIANCE SERVICE, ETC., ET AL.

Bailments—Sale of personal property under bailment lease—Provisions for assignment of lease—Waiver by assignee of defenses against lessor—Validity—Dispute as to defect in subject of lease—Refusal of lessor to pay—Bad credit report by assignee—Rights of lessee.

1. A clause in a bailment lease providing that the lessor may assign the lease, in which case lessor's assignee shall have all rights, powers and remedies of lessor but shall be subject to none of lessor's obligation, is valid and not against public policy.

2. Where such a lease is assigned to a bank, the lessee cannot justify refusal to make payments on the ground that the article leased was defective, nor is he entitled to have the lease canceled on that ground to prevent the bank from giving unfavorable credit references because of his failure to satisfy his obligation under the lease, or to recover for injuries allegedly sustained because of such references.

3. Under the circumstances above outlined, the lessee has no equitable cause of action against the lessor though he may have an action at law for damages for breach of contract.

Preliminary objections to complaint of C. P. No. 6 of Philadelphia County, September term, 1952, no. 314.

Bucci & Bucci, for plaintiffs.

Sundheim, Folz, Kamsler & Goodis and *Ernest L. Nagy*, for defendants.

FLOOD, J., December 24, 1952.—This case is before the court on preliminary objections to plaintiffs' complaint in

equity. The complaint alleges that plaintiffs purchased a Zenith television set from defendant ABC Appliance Service, hereinafter called ABC; that payment for this set was arranged under a bailment lease providing among other things that the lessor might assign the lease, in which case lessor's assignee should have all the rights, powers and remedies of lessor under the lease but should be subject to none of lessor's obligations; that the lease was thereupon assigned to defendant bank; that plaintiffs received and accepted delivery of the set from ABC but that the set was defective from the outset and never performed satisfactorily while in plaintiffs' possession. The complaint further avers that ABC made several futile attempts to remedy the aforesaid defects and eventually refused to attend to plaintiffs' complaints; that as a result of this plaintiffs refused to make further payments to the bank unless the set was either replaced or repaired; that the bank repossessed the set and subsequently sold it for the highest price obtainable, leaving a balance of $163.24 due from plaintiffs to defendant bank. Plaintiffs allege further that at a later date, they applied for an extension of credit at the Pennsylvania Company and this application was rejected due to unfavorable reference given by defendant bank; that upon inquiry plaintiffs were advised by defendant bank to pay the purported $163.24 balance due this bank. Whereupon plaintiffs pray: (a) That the lease agreement be canceled; (b) that defendant bank be restrained from giving unfavorable credit reference as to plaintiffs; (c) that defendants be ordered to compensate plaintiffs for injuries they sustained because of defendants' acts, and (d) for such general relief as the court may deem proper and fair under the circumstances.

Each defendant filed preliminary objections averring that plaintiffs have failed to state a valid cause of action as to it.

The determination of the question involved as to defendant bank depends upon the assignment clause in the lease. The clause itself is clear. It is in effect a waiver as

to assignee of any defenses plaintiffs have against the assignor. Unless the clause is unconscionable or against public policy we are bound to enforce it.

It is well settled that an assignee holds the assigned instrument subject to all the equities with which it was affected in the hands of the assignor. But it is equally well settled in Pennsylvania that the debtor may be estopped from asserting these equities as against the assignee by the declaration that he has no defense or set-off to the debt assigned. In the face of such declaration he cannot set up his defense against an assignee who takes on the faith of it: Ashton's Appeal, 73 Pa. 153 (1873); Sprenger for use, v. Litten, 142 Pa. Superior Ct. 194 (1940).

The basis for these decisions is not the phrasing of the declaration but the fact that such declarations induce the assignee to take the assignment. It would be inequitable to allow the debtor to later assert a defense which he declared that he did not have or he would not set up.

It has been held that if a maker states on a non-negotiable promissory note that he agrees that the note shall be subject to the same rules governing commercial paper as to equities, he waives his right to inquire into the fairness of the original transaction or the adequacy of the consideration: Howie v. Lewis, 14 Pa. Superior Ct. 232 (1900).

We can see no substantial difference between the agreement before us and an agreement that the instrument should be treated as commercial paper as to equities. In both situations the obligor is agreeing not to assert any defenses he may have against the assignor as to the assignee. Therefore the fact that the television set was defective is irrelevant in determining the rights and liabilities of plaintiffs and defendant bank.

Under the facts before us, plaintiffs are in debt to defendant bank. Consequently the bank had a right to give the "bad references" complained of. The bank's objections must be sustained.

Defendant ABC contends that plaintiff's complaint fails to state a cause of action as to it. Under the alleged facts ABC's objection must be sustained. The complaint fails to assert any valid cause of action in equity against this defendant. Upon the facts stated in the complaint, plaintiffs may have a cause of action against ABC for damages for breach of contract but if so they have not fully spelled it out.

The preliminary objections are sustained. The complaint is dismissed as to both defendants.

APPENDIX G

307. (Monroe Co.)—General Electric Credit Corporation, Appellant v. Ludwig Beyerlein and Barbara Beyerlein, Respondents. — Order unanimously affirmed with costs. Memorandum: Since the personal property in question is not consumer goods, the reliance of the court below on Quality Finance Co. v. Hurley, 337 Mass. 150 as creating an exception to Section 9-206 of the Massachusetts Uniform Commercial Code was mistaken. In this case, however, where the lessor assigned the lease soon after its execution before delivery or installation of the goods and before beginning to perform its other obligations under the lease, a question to be resolved at trial exists whether the contract provision in the lease of personal property which purports to exempt the lessor's assignee "for any of lessor's obligations" relates to the exemption from lessee's defenses under Section 9-206 or whether it relates to other duties to be performed by the lessor under the contract. Noblett v. General Electric Credit Corporation — F.2d — (United States Court of Appeals for the Tenth Circuit decided April 2, 1968). There are also questions of fact which should be determined on a trial as to whether appellant took the assignment in good faith and without notice of defenses. (Appeal from Order of Monroe Special Term, Macken, J., denying motion for summary judgment.) Present: Bastow, P. J., Goldman, DelVecchio, Witmer, Henry, J. J.